IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 488.

MARGARET GATELY,

Petitioner,

v.

EDITH HARITON, ET AL.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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STATEMENT OF FACTS.

The only issue before the District Court in this case was whether a certain leasehold interest was or was not an asset of the partnership. The District Court ruled that it was not a partnership asset, and directed the receiver not to sell or offer it for sale.

The partnership contract provided that in the event of a dissolution of the partnership the leasehold interest should

automatically vest in Jefferson L. Ford, Jr., and Edith Hariton. (See Article IV of Agreement, R. p. 16),

The lessee named in the lease was Jefferson L. Ford, Jr. (owner of the Lafayette Hotel), who, at the time of the execution and delivery of the lease, with the consent of the lessors, sublet the premises to the partnership, subject to the condition that it should revert in case of dissolution. The lease by its terms was not assignable.

Mr. David Hornstein, a witness produced on behalf of the intervenors, Jefferson L. Ford, Jr., and Edith Hariton, testified as follows:

> "As attorney for Mr. Ford, I negotiated for the lease of the premises in question. This lease was prepared by the attorneys for the owners, Mrs. Fannie M. Curtis and Jennie A. Murchison. I conferred with Mrs. Hariton, Mr. Parrish and Mr. Verkouteren, the latter representing appellant Margaret Gately. I was requested by Mr. Ford to include in the partnership agreement the provision above quoted. I drafted and prepared the partnership agreement. Mr. Ford and the other parties were made acquainted with the provision that the partnership would cease to have any interest in the lease in case of dissolution. (R. p. 53)
>
> "Appellant Mrs. Gately signed the partnership agreement after it had been prepared by me, and it was signed by the other two partners. I represented all of the partners to the agreement from the time of its inception. The owners of the land gave their consent to the assignment of the lease with the distinct understanding on their part that the partners had inserted the provisions aforesaid in their partnership agreement. No money was paid by any of the parties when they took over the restaurant business—they simply took the building on a lease arrangement, which included furniture, equipment and license then owned by the lessors. (R. p. 55)"

In ruling that the lease did not constitute a partnership asset the Court made no determination as to the ownership of the lease as between the lessors and the original lessee, since the decision of that question was not essential to a

determination of the only issue involved in this case, namely: whether the lease was a partnership asset to be sold by the receiver.

In answer to the intervening petition of Jefferson L. Ford, Jr., and Edith Hariton, claiming the lease pursuant to the terms of the partnership agreement, the petitioner, Margaret Gately, alleged: "that the parties to the partnership agreement did not at any time during the existence of the partnership abide by or adhere to the provisions of Article IV of said agreement, and that by reason of the aforementioned conduct on the part of the parties to said agreement the provisions of Article IV have been waived and cannot now be relied upon to vest title in said lease to Jefferson L. Ford, Jr., and Edith Hariton."

In said answer she set forth no facts from which an estoppel could arise, and upon the trial of the case no competent or material evidence was offered to sustain petitioner's present assertion of an estoppel. The Court so held in his Findings of Fact. (R. p. 109 to 112)

PART I.

(a) The judgment of the trial court was for a dissolution of the partnership; a reference to the Auditor of the Court to state the accounts thereof; and a direction to the receiver not to sell or offer to sell the lease in question. (R. p. 113)

Since the appeal was entirely without merit and was manifestly taken for the sole purpose of delay, the United States Court of Appeals for the District of Columbia committed no error in dismissing the appeal. The power of the Federal Appellate Courts to grant motions to affirm or dismiss frivolous appeals is well established.

Wagner Electric Manufacturing Co. v. Lyndon, 262 U. S. 226, 67 Law Ed. 961;
Roberts v. Wilkinson, 10 Fed. (2d) 311;
Dakin v. U. S., 105 Fed. (2d) 150;
McMillan v. Taylor, 81 U. S. Ct. of Appeals D. C. 249, 160 Fed. (2d) 217.

"To retain the case for oral argument under such circumstances would result in harmful delay and serve no useful purpose."

BODKIN v. EDWARDS, 266 U. S. 221, 65 Law Ed. 595.

(b) The Court made no determination as to the ownership of the lease and made no decision that would be binding upon the lessors with respect to the right to assign the lease. At no time did the petitioner make any effort to bring the lessors into court as parties in interest and no question as to alleged absence of necessary parties was referred to in any pleadings filed by the petitioner. (See Findings of Fact and Conclusions of Law, R, p. 109 to 112.)

(c) No competent evidence was excluded. The letter of Grattis H. Parrish, (referred to on page 8 of the present petition,) was excluded because it was immaterial and irrelevant to the only issue in the case. The statement in the petition that Parrish was Ford's agent is without support in the evidence.

PART II.

Petitioner noted her appeal from the judgment of the District Court on February 20, 1947, and docketed her appeal on April 30, 1947. During the intervening period no application was made to the trial court for a stay of proceedings, as would have been authorized by Rule 62 (a) Federal Rules of Civil Procedure; nor did petitioner make any effort in the trial court to furnish a supersedeas bond under the provisions of Rule 73 (d).

No application for a stay of proceedings was made until May 10, 1947. On May 17, 1947 respondents filed their motion to dismiss the appeal. On June 24, 1947, this motion was granted and at the same time and as a part of the same order the application for stay was denied. The granting of the motion to stay rested in the discretion of the Court and that discretion was exercised against petitioner after the Court had examined the record and had concluded to dismiss the appeal because it was frivolous.

There was no appeal from the judgment dissolving the partnership and appointing a receiver. (R. p. 117) That part of the judgment to which complaint is made is paragraph 5, which provided that the receiver should not sell the leasehold interest. (R. p. 114) This portion of the judgment being negative in form, there was no need to stay the same, as nothing could be gained by a stay of the judgment.

It is respectfully submitted that there has been no failure on the part of the U. S. Court of Appeals to give proper effect to any decision of this Court, or to any of the Federal Rules of Civil Procedure.

WHEREFORE, respondents respectfully pray that the petition for Writ of Certiorari should be denied.

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